STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2006
v	No. 261565 Oakland Circuit Court
RICHARD WESLEY YORK, Defendant-Appellant.	LC No. 2004-198500-FH

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of third-degree fleeing and eluding, MCL 257.602a(3), malicious destruction of police property, MCL 750.377b, and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 10 to 15 years' imprisonment for each conviction. We affirm.

Defendant's convictions arise from a high-speed police chase that occurred during rush hour. When defendant was ultimately stopped and arrested, a police officer discovered a rock of crack cocaine in his pocket.

Defendant first contends that defense counsel was ineffective for failing to raise and preserve the defense of insanity or temporary insanity and argues that the trial court improperly denied defense counsel's purported oral motion for a psychological examination. Because defendant failed to move for a new trial or *Ginther*[1] hearing in the lower court, his claim of ineffective assistance of counsel is not preserved for appellate review. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Absent a *Ginther* hearing, our "review of the relevant facts is limited to mistakes apparent on the record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

> Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002). [*Riley (After Remand), supra* at 139.]

Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant did not challenge the performance of defense counsel until the first day of trial and after the jury had already been impaneled. Furthermore, defense counsel never made an oral motion for a psychiatric evaluation as suggested by defendant. Even if defense counsel had requested an evaluation, by statute, defendant was not entitled to raise an insanity defense. The voluntary consumption of alcoholic beverages or controlled substances at the time of the offense does not provide a basis for an insanity defense. MCL 768.21a(2). Furthermore, MCL 768.37(1) eliminated the defense of voluntary influence or impairment by virtue of the consumption of controlled substances. Under MCL 768.37(2), a defendant may offer intoxication as a defense to a specific intent crime, but only if he or she can show that it was because of a "legally obtained and properly used medication or other substance," not an illegal controlled substance.

To the extent that defendant claimed that he "was out of his mind on drugs" at the time of the charged incident, defendant could not claim the insanity defense. As noted *supra*, a defendant may not raise the defense of insanity by intoxication in relation to a voluntarily consumed, illegal substance. MCL 768.21a(2); MCL 768.37(1). Moreover, contrary to defendant's assertion, there is no evidence anywhere in the record that defendant suffered from schizophrenia or had received any mental health treatment. In fact, the presentence investigation report (PSIR) indicates that defendant has no known mental health problems. Accordingly, defendant's challenge on these grounds lacks merit, and trial counsel was not ineffective for failing to raise the issue.

Defendant also challenges his sentences for the convicted offenses. First, defendant asserts that the sentencing court improperly scored offense variable (OV) 13 ten points. Defendant contends that there was no record evidence to support this score and that the court improperly based this score on facts not found by a jury in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We first note that the Michigan Supreme Court has already determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing guidelines. *People v Drohan*, 475 Mich 140, 159-162; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

We also agree with the sentencing court's assessment of ten points for OV 13. It is within the sound discretion of the sentencing court to determine the number of points to be assessed for a given sentencing variable "provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We must uphold the sentencing court's decision where there is "any evidence" to support that score. *Id.* Pursuant to MCL 777.43(1)(c) (emphasis added), a sentencing court may score ten points for OV 13 when the convicted "offense was part of a pattern of felonious criminal activity involving *a*

combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii)." According to the PSIR, defendant was convicted of a crime against a person and a crime against property within the statutory five-year period preceding the current offense. See MCL 777.43(2)(a). Moreover, defendant was awaiting trial for another property crime while the current trial was pending. Accordingly, we must affirm defendant's sentences in this regard.

Defendant also contends that the sentencing court improperly departed upward from the minimum sentencing guidelines range for the fleeing and eluding conviction. A sentencing court must impose a minimum sentence within the guidelines range unless a departure is permitted. MCL 769.34(2). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for the departure." MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003). These reasons must be objective and verifiable and keenly or irresistibly grab the court's attention. *Babcock*, *supra* at 258. The court may depart from the guidelines where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A departure is appropriate if these reasons "lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history . . . ." *Babcock*, *supra* at 264. This Court reviews the sentencing court's determination for an abuse of discretion, which "occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at 269.

At the sentencing hearing, the court determined to depart upward from the sentencing guidelines, stating:

> I am very distressed by your continuous criminal behavior. You're obviously an extremely intelligent man, and you're just wasting your life . . . . Every time you're released from prison, you commit another crime. I agree with the prosecutor. I don't think that the guidelines sufficiently address your prior record and the recidivism [sic] nature of your behavior and, in particular, how quickly after you're released from prison you commit another crime.
>
> Those factors aren't addressed in the guidelines, and they should be addressed by a sentencing Judge in regard to, one, the question of likelihood of rehabilitation, and two, the question of protection of the public.

Contrary to defendant's assertion, this quotation clearly reflects that the sentencing court did articulate its reasons for departing upward from the minimum sentencing guidelines range. According to defendant's PSIR, defendant had 22 prior felony convictions and four misdemeanor convictions. Defendant's history of theft, fraud, and drug-related crimes date back to 1969. Defendant had, in fact, violated the conditions of his parole in committing the charged offenses and had violated imposed parole conditions in the past. The PSIR expressly states that "[e]ach time [defendant] has been released from custody, he has returned to prison for violating his parole due to new criminal convictions." At the time the PSIR was prepared, defendant had already spent a total of 25 years in prison.

Moreover, defendant had repeatedly failed to respond to drug-treatment programs. In 1996, defendant failed to complete a drug-treatment program that was a condition of his parole. In 2003, defendant "successfully completed" an in-patient drug-treatment program as a condition of his parole. In 2004, however, defendant absconded from parole supervision and left a drug-treatment program after he was caught trying to use someone else's urine in a drug screening. Defendant also admitted that he had not held employment due to his numerous incarcerations. The reasons stated by the sentencing court on the record were more than adequate to support the increase in defendant's sentence.

Defendant also raises several appellate challenges in pro per. Defendant first contends that the trial court abused its discretion by failing to conduct a preliminary examination within 14 days of arraignment. However, *defense counsel* requested the adjournment based on information that defendant was in the jail infirmary and could not be transported to the district court. Defendant's illness clearly amounted to good cause to postpone the examination. Moreover, we will not reverse a defendant's conviction based on the failure to timely conduct a preliminary examination where the defendant has already been tried and convicted. *People v Hall*, 435 Mich 599, 605; 460 NW2d 520 (1990).

Defendant contends that the trial court abused its discretion in denying his motion for disqualification and in failing to sign the order denying that request until the morning of trial. Defendant waived his challenge by failing to appeal the trial court's denial of his motion to the chief circuit judge. MCR 2.003(C)(3)(a); *People v Williams*, 198 Mich App 537, 544; 499 NW2d 404 (1993). However, we note that the trial court was not required to reduce its denial of defendant's oral motion for disqualification to writing in order for defendant to appeal that decision to the chief circuit judge, a fact of which the trial court informed defendant. Moreover, defendant has not established that judicial disqualification was appropriate in this case. Defendant cites to an off-the-record remark that we are unable to review. The only other information allegedly resulting in the trial judge's bias was learned through these proceedings and cannot form the basis for disqualification. *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996).

Defendant further asserts that the trial court improperly rejected the recommended sentence in his *Cobbs*[2] agreement with the prosecution. We review a trial court's determination that it cannot abide by the terms of a plea agreement for an abuse of discretion. *People v Williams*, 464 Mich 174, 177; 626 NW2d 899 (2001). Where unpreserved, however, our review is limited to plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). On October 8, 2004, defendant entered a guilty plea as a fourth habitual offender to several charges. In exchange, the prosecution agreed to seek a minimum sentence of only two years for those offenses. However, the trial court indicated that it could not abide by the terms of the plea agreement and allowed defendant to withdraw his guilty plea. While defendant asserts that the trial judge threatened to impose a 10- to 15-year sentence against defendant as retribution for his insistence on a jury trial, there is no record evidence that

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

such a statement was made. Rather, a trial court is entitled to determine that it cannot abide by a *Cobbs* agreement and proceed accordingly.

While "the prosecution is bound by the terms of the plea agreement[,] [a] trial court is not bound." *People v Arriaga*, 199 Mich App 166, 168; 501 NW2d 200 (1993). See also MCR 6.302(C)(3)(a) (indicating that the court may reject a plea agreement between the defendant and the prosecution). In *Williams*, *supra* at 177, 180, the Michigan Supreme Court determined that a trial court is entitled to indicate that it cannot abide by the terms of a *Cobbs* agreement. When that happens, the previous bargain comes "to an end" and the defendant must proceed as if no agreement had been reached. *Id.* at 180. Accordingly, contrary to defendant's assertion, the trial court was entitled to reject the *Cobbs* plea agreement. The court properly informed defendant of its plans and allowed defendant to withdraw his guilty plea pursuant to MCR 6.302(C)(3).

Defendant also challenges the trial court's failure to indicate what sentence it intended to impose if defendant maintained his guilty plea. Pursuant to MCR 6.310(B)(2)(a), a defendant is entitled to withdraw his or her guilty under these circumstances as follows:

> [T]he plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea[.]

However, a *Cobbs* plea is treated differently than a traditional plea in this respect. As explained in *Williams*, *supra* at 179-180:

> [T]he degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.
>
> Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is *not to specify the actual sentence that would be imposed if the plea is allowed to stand*. [Emphasis added.]

Because this case involved a *Cobbs* agreement, the trial court was prohibited from informing defendant of his potential sentence should he maintain his plea or proceed to trial.

Defendant further asserts that the trial court attempted to coerce him into maintaining his guilty plea by threatening to impose a 10- to 15-year sentence should defendant be convicted at

trial. It is well established that a defendant's plea must be voluntary and not the result of force or threats. MCR 6.302(C)(4)(b). However, there is no indication on the record that the trial judge threatened to impose a harsher sentence as retribution for defendant's insistence on a trial. The challenged comment in which the trial judge allegedly told defense counsel that she would impose a 10- to 15-year sentence is not part of the lower court record. Accordingly, there is no record evidence to warrant appellate review.

Defendant contends that the trial court improperly denied his request for the appointment of new counsel. However, defendant never requested the substitution of counsel and never made an unequivocal request to represent himself on the record. See *People v Russell*, 471 Mich 182, 188, 190; 684 NW2d 745 (2004). However, we note that the substitution of counsel on the first day of trial, after the jury had been already been impaneled, would have "unreasonably disrupt[ed] the judicial process." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Moreover, defendant's challenge to his counsel's performance, i.e., that counsel refused to file the motions prepared by defendant, would not merit the substitution of counsel. *Id.* at 463.

Finally, defendant raises several in pro per challenges to counsel's performance. As noted *supra*, absent a *Ginther* hearing, our "review of the relevant facts is limited to mistakes apparent on the record." *Riley (After Remand)*, *supra* at 139. First, defendant challenges defense counsel's failure to timely file a motion to dismiss the charges against him given the delay in conducting the preliminary examination. However, as noted *supra*, this delay was based on good cause, i.e., defendant's illness. Moreover, the only prejudice cited by defendant in this regard is the loss of a "critical" defense witness during the delay. That witness could only provide evidence relevant to a charge that was dismissed prior to trial. Accordingly, defense counsel's motion, even if made in a timely fashion, would have lacked merit. Defense counsel need not raise meritless or futile motions. *Snider*, *supra* at 425.

Second, defendant challenges defense counsel's failure to file a motion to sever the charges. In that motion, defendant sought the severance of the trial on the possession of cocaine charge from the trial on the fleeing and eluding and destruction of police property charges on the ground that the possession of cocaine had no relation to the other charges. However, review of MCR 6.120, the court rule governing severance, reveals that defendant was not entitled to severance in this case. The charges against defendant arose from one single transaction between the police and defendant. When he was arrested for fleeing and eluding and malicious destruction, it was discovered that defendant had a rock of crack cocaine in his pocket. Under the circumstances, the severance of the charges may have led to confusion in a separate possession trial. Accordingly, defense counsel was not required to raise this meritless motion. *Snider*, *supra* at 425. Moreover, decisions regarding which motions to file are matters of trial strategy within the sound professional judgment of counsel. *Traylor*, *supra* at 463.

Third, defendant challenges defense counsel's failure to timely secure a written order denying defendant's motion for judicial disqualification so that the denial could be appealed to the chief circuit judge. However, the trial judge specifically instructed defense counsel that he need not prepare anything in writing before taking the issue to the chief judge. Moreover, as noted *supra*, the only comment allegedly demonstrating the trial judge's bias was purportedly made off the record and would not have been available for the chief judge's review. There is no indication that the trial judge imposed a harsher sentence for vindictive reasons. Therefore, once again, defense counsel was not required to raise this futile motion. *Snider*, *supra* at 425.

Fourth, defendant contends that defense counsel should have requested an evidentiary hearing in the circuit court regarding the alleged crack cocaine because the chain of evidence was not intact and because the police officers' versions of events did not match. However, the evidence would not have been excluded on this ground even if the court had conducted an evidentiary hearing. Gaps in the chain of custody affect the weight of the evidence, not its admissibility. *People v White*, 208 Mich App 126, 132; 527 NW2d 34 (1994).

Fifth, defendant challenges defense counsel's failure to object when the trial court failed to abide by the *Cobbs* plea agreement and counsel's failure to ensure that the reasons for defendant's withdrawal of his plea were placed on the record. However, as noted *supra*, the trial court properly indicated that it could not abide by the minimum sentence imposed in the plea agreement and allowed defendant to withdraw his guilty plea on that basis. Defense counsel could take no further action to protect his client's rights and further objection would have been futile. *Snider*, *supra* at 425.

Sixth, defendant contends that defense counsel failed to object to the prosecution's failure to provide a copy of the sentencing memorandum until the sentencing hearing. Defense counsel failed to tell the court that he had not received a copy of the prosecution's sentencing memorandum until the court had already concluded the parties' arguments and had imposed its sentence. Although defense counsel should have been more diligent in this regard, defendant was not prejudiced by this failure. The memorandum was based completely on defendant's prior criminal history and drug use in relation to his failure to rehabilitate. Defense counsel was aware of defendant's history and recidivist nature. Accordingly, this error did not affect the outcome of defendant's sentences.

Seventh, defendant challenges defense counsel's failure to discuss trial strategies with him in advance of trial, resulting in defense counsel being unprepared. Based on the existing record, however, we are unable to determine whether defense counsel failed to discuss trial strategy with defendant. Even if defense counsel failed to discussed trial strategy with defendant, there is no indication that defendant was prejudiced.

In the same vein, defendant contends that defense counsel should have filed many motions prepared by defendant. However, the decision of what motions to file is a matter of trial strategy within the professional judgment of the attorney and not the client. *Traylor*, *supra* at 463. Moreover, in preparing his own motions to be filed before the court, it appears that defendant was attempting to both represent himself and have the assistance of counsel. A defendant is not entitled to such "hybrid" representation in this state. *People v Kevorkian*, 248 Mich App 373, 420; 639 NW2d 291 (2001); *United States v Mosely*, 810 F2d 93 (CA 6, 1987).

Eighth, defendant contends that defense counsel failed to properly prepare for jury selection by providing suggested voir dire questions to the trial court. Yet, there is no indication in the lower court record that the trial judge requested suggested questions. Furthermore, defendant has not indicated what questions could have been asked that would have changed the composition of the jury panel in his favor. Because defendant has not alleged any prejudice on this ground, his challenge lacks merit.

Ninth, defendant argues that defense counsel should have argued that defendant was innocent of the charges against him in opening statement. In this case, however, there can be no

doubt that defendant actually committed the offenses with which he was charged. Police officers saw defendant leave the hotel. When they tried to stop him, he ran into two police cars and led the police on a high-speed pursuit through rush-hour traffic. When defendant was stopped and arrested, the officers found a rock of crack cocaine in his pocket. The jury would have seen through such a disingenuous denial of guilt and defense counsel was wise not to make such an argument. *People v Matuszak*, 263 Mich App 42, 60-61; 687 NW2d 342 (2004).

Finally, defendant contends that he is entitled to a new trial because of the cumulative effect of the numerous errors committed by defense counsel. The cumulative effect of numerous, actual errors "can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *LeBlanc*, *supra* at 591. "The effect of the errors must [be] seriously prejudicial in order to warrant" reversal. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, as noted throughout, defense counsel did not commit any errors sufficient to warrant reversal. Counsel's deficiency in failing to inform the court that he had not timely received the prosecution's sentencing memorandum is simply insufficient for appellate relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood